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No. 03-1116, No. 03-1120

IN THE

Supreme Court of the United States

JENNIFER M. GRANHOLM, Governor, *et al.*,
Petitioner,

v.

ELEANOR HEALD, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE NATIONAL ALCOHOL BEVERAGE CONTROL ASSOCIATION AND THE NATIONAL CONFERENCE OF STATE LIQUOR ADMINISTRATORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Did the Sixth Circuit err in ruling, contrary to decisions by the Second Circuit and Seventh Circuit in similar cases, that a State cannot prohibit the shipment of alcohol beverages from out-of-state producers directly to in-state consumers pursuant to the provisions of the Twenty-First Amendment and the Webb-Kenyon Act, 27 USC §122, while allowing in-state producers to ship directly to consumers?

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Pursuant to Rule 37 of the Rules of this Court, the National Alcohol Beverage Control Association (NABCA) and the National Conference of State Liquor Administrators (NCSLA), by their attorney, file this brief as *amici curiae* supporting the position of the Petitioners and respectfully urge this Court

[1] Counsel of record for the *amici curiae* was the sole author of this brief. No person or organization other than the *amici curiae* have made a monetary contribution to the preparation or submission of this brief.

to overturn the judgment of the United States Court of Appeals for the Sixth Circuit in *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003). This brief is filed with the consent of the parties, evidence of which is submitted with this brief.

INTEREST OF *AMICI CURIAE*

NABCA is a Wyoming non-profit corporation whose members are the alcohol beverage regulatory agencies in the 18 states (Alabama, Idaho, Iowa, Maine, Michigan, Mississippi, Montana, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, Utah, Vermont, Virginia, Washington, West Virginia and Wyoming) that directly control the distribution and sale of alcohol beverages within their borders by means of government-operated wholesale and, in some cases, retail outlets. In addition to the enumerated states, Montgomery County, Maryland is an Active Member of NABCA and the North Carolina Association of ABC Boards and Worcester County, Maryland are Participating Members. These jurisdictions are commonly referred to as "control" jurisdictions.

NABCA member agencies also perform licensing and regulatory functions with regard to private alcohol beverage distribution channels within their jurisdiction. Additionally, these agencies are responsible for the enforcement of laws pertaining to alcohol beverage distribution in the private sector.

NCSLA is an unincorporated organization which represents the remaining 32 states, often called "open" or "license" states. In these jurisdictions, the state government acts only in a licensing, regulatory and/or enforcement capacity, having chosen, pursuant to the Twenty-First Amendment to the U.S. Constitution, to permit the distribution of alcohol beverages to be accomplished entirely by the private sector.

Thus, together, the NABCA and NCSLA member jurisdictions represent all 50 states.

Because statutes similar to the one implicated in the instant case is or has been the subject of litigation in nearly a dozen states across the country and because alcohol beverage regulation has largely been a matter for state, rather than federal government control, the *amici* have a great interest in the outcome of this matter.

STATEMENT OF THE CASE

Alcohol beverages constitute one of the most highly regulated lawful commodities available in commerce. The American experience with this product includes a history of taxation and regulation dating back to colonial times. With few exceptions—the federal excise tax and the failed experiment of national Prohibition being the prime examples—the regulation of alcohol beverages has taken place at the state level.

The mix of state regulation was recognized as a problem for interstate commerce more than a century ago when Congress adopted the so-called Wilson Act, sometimes referred to as the "Original Packages Act."[2] This law had its flaws, however, and Congress subsequently adopted the Webb-Kenyon Act, which specifically divested alcohol beverages of their interstate commerce protection where the interstate shipment occurred in violation of state laws.[3]

A few years later, the Eighteenth Amendment to the Constitution was ratified, launching a lengthy, but eventually unsuccessful effort at creating a "dry" nation, one totally free of the distribution and sale of alcohol beverages. When the effort failed after a dozen years, Congress adopted and the states ratified the Twenty-First Amendment. This enactment not only repealed the Eighteenth Amendment, but it also, in Section 2,

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[2] 27 USC §121

[3] The Act of Mar. 1, 1913, c. 90, was entitled "An Act divesting intoxicating liquors of their interstate character in certain cases."

declared a clear national policy to carve out an exception to normal Commerce Clause jurisprudence:

> The transportation or importation into any State. . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

And, so there would be no mistake about its intent, following ratification of the Twenty-First Amendment, Congress re-enacted the Webb-Kenyon Act in 1935.[4] The language of that Act, for all practical purposes, is identical to Section 2.

It is against this backdrop that the Sixth Circuit, in the instant case, held that Michigan's statutory provisions treat out-of-state and in-state wineries differently and that the differential treatment did not fall within the so-called "core powers" reserved to the state under the Twenty-First Amendment.

SUMMARY OF ARGUMENT

NABCA and NCSLA believe that the Sixth Circuit's decision was in error and that this Court should review and ultimately overturn the decision because it ignores the plain language of the Twenty-First Amendment, because it conflicts with a lengthy series of decisions of this Court, because it conflicts with decisions of other circuits in similar cases, and, finally, because the issue is of significant national importance to the alcohol beverage regulatory scheme of the several states.

I. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH THE PLAIN LANGUAGE OF THE TWENTY-FIRST AMENDMENT AND THE WEBB-KENYON ACT AS WELL AS DECISIONS OF THIS COURT.

The Sixth Circuit's approach was to apply a "traditional" dormant Commerce Clause analysis and, if the state's

[4] The Act now appears at 27 U.S.C.§ 122.

provisions were found to be unconstitutional, to then determine if they were somehow "saved" by application of the Twenty-First Amendment. NABCA and NCSLA believe that this approach is in error.

As indicated, the plain language of Section 2 of the Twenty-First Amendment could not be clearer with regard to Congressional intent. Nowhere does Section 2, or the Webb-Kenyon Act, which was adopted under Congress' Commerce Clause authority and which both predated and subsequently reaffirmed Section 2, state that the importation of alcohol beverages must comply only with those state laws that treat in-state products in a like manner to the way out-of-state products are treated.

Indeed, this Court has consistently recognized the significance of this language. In one of its earliest pronouncements on the subject, this Court held

> The Twenty-First Amendment sanctions the right of a state to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause. Without doubt a state may absolutely prohibit the manufacture of intoxicants, their transportation, sale, or possession, irrespective of when or where produced or obtained, or the use to which they are to be put.

Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138 (1939)

The Court went on to conclude the greater power to prohibit transportation also includes the lesser power to permit such transportation only under definitely prescribed conditions. "The state may protect her people against evil incident to intoxicants and it may exercise large discretion as to means employed," this Court flatly declared. *Ibid.*, at 138.

In *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964), in which this Court set out a principle of accommodating the Twenty-First Amendment with the Commerce Clause, this Court nevertheless stated that had a

state sought to regulate or control the transportation of the liquor into its jurisdiction until its delivery into another jurisdiction (in this case, a national park), the state "would have been constitutionally permitted to do so."

In *California Retail Liquor Dealers Assn. v. Midcal Aluminum*, 445 U.S. 97 (1980), this Court set out a balancing test between the Twenty-First Amendment and the Commerce Clause, but noted that the test applies only to regulations other than whether to permit importation or sale of liquor and how to structure the liquor distribution system.

Less than a decade later, in *North Dakota v. U.S.*, 495 U.S. 423 (1989), this Court cited *Midcal* in again asserting that states have "virtually complete control" over the importation and sale of liquor and the structure of the distribution system within their jurisdictions.

And, finally, in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), the last instance in which this Court has reviewed the Twenty-First Amendment, this Court once again declared that the Amendment delegated to the states the power "to prohibit commerce in" alcohol beverages.

Thus, put quite simply, the Sixth Circuit misapplied the law in this case and departed from the settled interpretations of this Court with regard to the importation of alcohol beverages. While a Commerce Clause analysis may have a place with regard to "other regulations," NABCA and NCSLA submit that it has no place in consideration of state laws which regulate, or even prohibit the importation of alcohol beverages.

II. THE SIXTH CIRCUIT DECISION CONFLICTS WITH DECISIONS OF THE SECOND AND SEVENTH CIRCUITS CONCERNING A REGULATORY SCHEME THAT IS VIRTUALLY IDENTICAL TO THE ONE IN THE INSTANT CASE.

As further rationale as to why this Court should review the Sixth Circuit's decision, NABCA and NCSLA note that it conflicts squarely with a unanimous decision of the Seventh Circuit in a case involving virtually the same regulatory scheme. *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), cert. denied sub nom. *Bridenbaugh v. Carter*, 532 U.S. 1002 (2001).

In that case, Judge Easterbrook wrote that Indiana's ban on direct shipments of wine from outside the state to consumers within the state was a valid exercise of Indiana's plenary power under the Twenty-First Amendment, which, he noted, directly authorizes states to "control alcohol in ways that it cannot control cheese."

> No longer may the dormant commerce clause be read to protect interstate shipments of liquor from regulation; § 2 speaks directly to these shipments. Indeed all "importation" involves shipments from another state or nation. *Every* use of § 2 could be called "discriminatory" in the sense that plaintiffs use that term, because every statute limiting importation leaves intrastate commerce unaffected. If that were the sort of discrimination that lies outside state power, then § 2 would be a dead letter.
>
> No decision of the Supreme Court holds or implies that laws limited to the importation are problematic under the dormant commerce clause.

Ibid., 227 F.3d at 853.

Subsequent to the Sixth Circuit's decision, a unanimous panel in the Second Circuit, after an extensive discussion of the history of the Twenty-First Amendment and the decisions of this Court, concluded that the statutory scheme in New York, as in Michigan, regulated only the importation into and distribution of alcohol within the state and the statute fell within the ambit of the powers granted to states by the Twenty-First Amendment. The state's regime, said the panel, targets "valid state interests in controlling the importation and transportation of alcohol." *Swedenburg, et al. v. Kelly, et al.*, Nos. 02-9511, 02-7089 Con (Slip Op. 2nd Cir. Feb. 12, 2004), 2004 WL 254401.

If the Sixth Circuit's opinion is allowed to stand, there will be differing rules in differing circuits as to the manner in which states are allowed to regulate or control the importation of alcohol beverages, leading to the same confusion and inconsistency in state laws that this Court and Congress sought to resolve beginning more than a century ago.

III. THIS CASE HAS SIGNIFICANT NATIONAL IMPORTANCE.

As indicated, alcohol beverages constitute one of the most heavily regulated and taxed lawful products traveling in commerce today. Not everyone can sell alcohol beverages. Producers, importers and wholesalers must apply for and be granted a federal Basic Permit by the Alcohol and Tobacco Tax and Trade Bureau, an agency of the Department of the Treasury. They, like brewers and retailers, must also be licensed by the states (one or more) in which they propose to do business; the licensing process often involves an extensive criminal background check.

And not everyone can buy alcohol beverages. Purchasers in every state must be twenty-one years of age or older. In many states, on-premises retailers (e.g., restaurants, taverns, and bars)

are prohibited from selling alcohol beverages to any adult who is or who appears to be intoxicated.

The only way a state can insure compliance with its laws is to have a system of accountability, with penalties associated with violations of state law. Accountability can only occur if the states have the ability to reach the seller, i.e., if the seller has some kind of presence in the state to justify jurisdiction and enforcement. Without accountability, there can be no effective regulation. Upholding the Sixth Circuit's decision would undermine accountability and create what some have called "alcohol anarchy."

Some states have chosen to permit direct shipping of alcohol beverages, but only under carefully controlled circumstances. That is their right under the Twenty-First Amendment. But no state allows unlimited and unregulated direct shipping. For them and for the states like Michigan and more than two dozen others which have opted to secure accountability through other means and which ban the interstate direct shipment of alcohol beverages, this case has enormous importance.

If the Sixth Circuit's decision is upheld, how are states going to effectively keep alcohol beverages out of the hands of minors? A recent federally-funded study suggests that the problem of internet alcohol beverage purchases is so great that "an argument can certainly be made for banning Internet and home delivery sales altogether in light of the likelihood that these methods will be used by underaged purchasers."[5]

If the Sixth Circuit's decision is upheld, how are states going to effectively collect the taxes that are due on alcohol beverage sales? This Court's decision in *Quill v. North Dakota*, 504 U.S. 298 (1992) makes it clear that attempts to require out-of-state

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[5] *Reducing Underage Drinking: A Collective Responsibility*. Richard J. Bonnie and Mary Ellen O'Connell, Editors. National Research Council and Institute of Medicine (2003), at 176.

sellers to remit sales, and possibly other, taxes place impermissible burdens on interstate commerce that only Congress can rectify.

If the Sixth Circuit's decision is upheld, how are states going to insure that alcohol beverages do not reach "dry" areas where residents have determined that they do not wish the sale of alcohol beverages to occur?

As indicated, the issues surrounding this case have been, and are being litigated across the country. Decisions have been rendered in the Fourth Circuit,[6] Fifth Circuit[7] and Eleventh Circuit.[8] Cases are currently pending at the trial level in Arizona,[9] New Jersey,[10] Ohio[11] and Rhode Island.[12] Other states are potential targets of similar litigation. A clear mandate from this Court is needed to avoid further inconsistency and conflict.

The cornerstone of alcohol beverage regulation in this country has always been that it is up to the states—not the federal government or the federal judiciary—to regulate the importation and transportation of alcohol beverages into their jurisdictions. This is not a case about a few oenophiles wanting to buy fine wine that might not otherwise be available in their community, or other purchasers wanting the convenience of sitting at their computers and ordering on-line, the way they order books and apparel. Alcohol beverages and their regulation are *sui generis* and should remain that way.

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[6] *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003) and *Bolick v. Danielsen*, 330 F.3d 274 (4th Cir. 2003).

[7] *Dickerson v. Bailey*, 336 F.3d 274 (5th Cir. 2003).

[8] *Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002).

[9] *Parker v. Morrison*, No. 2:03-cv-01948 (D. Ariz.).

[10] *Freeman v. McGreevey*, No. 2:03-cv-03140 (D. N.J.).

[11] *Stahl v. Taft*, No. 2:03-cv-00597 (S.D. Ohio).

[12] *Wolfson v. Carcieri*, No. 1:03-cv-00463 (D. R.I.).

CONCLUSION

For the reasons stated above, it is urged that this Court reverse the opinion of the United States Court of Appeals for the Sixth Circuit and declare that, pursuant to the Twenty-First Amendment and 27 U.S.C. § 122, states have the right to prohibit the direct shipment of alcohol beverages from out-of-state sources even when they permit in-state suppliers to ship directly.

Respectfully submitted,

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